90-1472

Supreme Court, U.S.
FILED
MAR 18 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

M. SLAVIN & SONS, LTD.,

Petitioner,

v.

ANTHONY CIRILLO, Individually and as President of UNITED SEAFOOD WORKERS, SMOKED FISH, AND CANNERY UNION, LOCAL 359, UFCWIU, AFL-CIO,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a labor arbitrator's award be enforced when the award clearly deprives the Employer of its contractual right to common law mitigation of damages?

2. Alternatively, does an arbitrator's award, which fails to require mitigation of damages, show a manifest disregard for the law?

LIST OF PARTIES

The parties to the proceeding below were Petitioner M. Slavin & Sons, Ltd., and the following Respondents: Anthony Cirillo, individually and as President of United Seafood Workers, Smoked Fish and Cannery Union, Local 359, UFCWIU, AFL-CIO.

RULE 29.1 DISCLOSURE

There are no parent companies or subsidiaries of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, M. Slavin & Sons, Ltd. ("Slavin" or "the Employer") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in the within proceeding on November 2, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported. It is reprinted in the Appendix hereto as Appendix A, *infra*, App. 1-3. The Order of The Court of Appeals denying Petitioner's petition for rehearing and suggestion for rehearing *in banc* is reprinted in the Appendix B, *infra*, App. 4-5.

The memorandum decision of the United States District Court for the Eastern District of New York (Korman D.J.) denying Petitioner's Petition to Vacate the award of Arbitrator Robert Weaver has not been reported. It is reprinted in the Appendix hereto as Appendix D, *infra*, App. 7-16.

JURISDICTION

Invoking federal jurisdiction under 9 U.S.C. Section 1 *et seq.*, 29 U.S.C. Section 185(a), on April 19, 1990, the Petitioner filed in the United States District Court, Eastern District of New York, Petitioner's Notice of Motion and Petition to Vacate Arbitration Award. On May 18, 1990, the District Court denied Petitioner's Petition and the District Court issued an Order to that effect. (Appendix D, *infra*, App. 7-16).

On November 2, 1990 the Second Circuit entered a judgment and opinion affirming the Order of the District Court. (Appendix A, *infra*, App. 1-3.). On December 17, 1990, the Second Circuit entered an order denying Petitioner's petition for rehearing and suggestion for rehearing *in banc*. (Appendix B, *infra*, App. 4-5.)

The jurisdiction of this Court to review the judgment of the Second Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutes involved herein are Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. Section 185(a), as it provides to federal courts the basis of jurisdiction in labor-management contract disputes, and Section 10(d) of the Federal Arbitration Act, 9 U.S.C. Section 10(d), as it sets forth standards for review of an Arbitrator's Award.

Section 301(a) of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 10(d) of the Arbitration Act reads:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –
>
> (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

STATEMENT OF THE CASE

M. Slavin and Sons, Ltd. is an employer engaged in the buying and selling of seafood at the wholesale and retail levels. Slavin maintains one place of business in the Fulton Fish Market, on South Street in Manhattan, and another place of business at 31 Belmont Avenue, in the East New York section of Brooklyn ("Brooklyn").

The wages, hours and other terms and conditions of employment for the Slavin employees in Manhattan and Brooklyn are governed by separate collective bargaining agreements ("Market Agreement" and "Brooklyn Agreement," respectively) in effect between Slavin and the Union.

George Medina (hereinafter "Medina") was employed by Slavin as a truck driver operating out of the Brooklyn facility from June 6, 1980, until the termination of his employment by the Company on November 6, 1986.

The Union grieved Medina's termination pursuant to the provisions of the Brooklyn Agreement. On June 23, 1987, Arbitrator Bertram Kupsinel directed Slavin to reinstate Medina and to make him whole for his loss of pay during the period between the date of his discharge and the date of the offer of reinstatement.[1] The opinion and

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[1] Arbitrator Kupsinel's award stated, in pertinent part:

> "The Company did not have just cause to discharge George Medina. The Company is directed to offer George Medina reinstatement to his former position. *The Company is directed to make George Medina whole*

(Continued on following page)

award of Arbitrator Kupsinel is reprinted in the Appendix hereto as Appendix F, *infra*, App. 29-55.

Slavin reinstated Medina to employment with the Company on or about February 19, 1988, operating primarily out of the Company's Fulton Fish Market location in Manhattan. Although operating from a different location, Medina's duties were substantially the same as those existing before his discharge, as was his pay scale.

However, the parties were unable to resolve the amount of back pay due, and the Union sought arbitration on the issue. Hearings were held at the office of the American Arbitration Association before Arbitrator Robert S. Weaver, on September 21, 1989, October 31, 1989, and November 2, 1989.

At the first day of hearing, the parties immediately discussed a stipulation of the issues to be decided by the Arbitrator. The Union stated that it saw the issue to be how much money is owed to George Medina *to make him whole* for his loss of employment from November 7, 1986, (a) to the date of his reinstatement and (b) whether the employer had the right to return him to work as a hand truck pusher in the Fulton Fish Market rather than return him to work as a truck driver. The Employer's attorney stated that in determining the amount of back pay owed to Medina and Medina's duty to mitigate, the arbitrator

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(Continued from previous page)

for loss of pay and other benefits from date of his discharge to the date of the offered reinstatement" (App. 29,55) (emphasis added).

was obligated to inquire into Medina's efforts to find other employment.

After extensive discussion as to their respective positions on matters not relevant here, the parties stipulated that the issue before Arbitrator Weaver was "Did the Employer comply with the arbitration award?" The Union Counsel then stated that his understanding of the issues before the Arbitrator were the amount of back pay owed to Medina and Medina's attempt to mitigate the damages during the interim period.

Following the framing of the issues, the parties proceeded to an extended discussion of the *subpoenas duces tecum* served by Slavin on the Union and the Union Funds. The Employer had subpoenaed a number of documents which related solely to the issue of mitigation of damages by Medina. The Union objected to certain requests as being overbroad, but clearly understood the purpose of other requests and agreed to comply. For example, Union's Counsel found the Employer's request for a list of new members to the Union from 1986 to 1988 to be relevant to the issue of mitigation because the list would indicate job opportunities within the Union's bargaining units that were available to Medina and whether Medina had refused to accept these job opportunities.

Following the discussions about the specific items requested in the subpoenas, the Employer sought to have Medina testify about his attempts to seek alternative employment. The Union objected to the Employer's request and argued instead that Medina should not testify about this issue until after he had an opportunity to review his own records and refresh his recollection about

his own mitigation efforts. The Arbitrator considered this question to be primarily a question of which party had the burden of proof, but left no doubt that he would consider whether Medina had mitigated his damages.

Thereafter, there were two (2) days of hearing that focused primarily on these issues. Union president Cirillo testified regarding job openings and opportunities in the Fulton Fish Market. Medina testified as to his sporadic efforts to find work, and that he absented himself from the job market for a significant period of time to care for his children while his wife worked.

Despite the understanding and agreement of the parties on the "duty to mitigate" issue, the fact that the hearing was adjourned to allow the employer access to documents relevant solely to the mitigation issue, and the subsequent concentration of the hearing testimony on Medina's mitigation efforts, in his decision Arbitrator Weaver renounced any obligation to consider the issue of mitigation of damages, claiming that he was prevented from so doing because of the prior award of Arbitrator Kupsinel, which did not specifically mention Medina's mitigation obligation. (Appendix E, App. 24-27).[2] Then, despite this claim that he was somehow precluded from considering mitigating factors, Weaver proceeded to consider and deduct amounts representing two mitigating factors – interim earnings and unemployment compensation to arrive at a total back pay award of approximately $47,500 (Appendix E, App. 26-27).

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[2] The opinion and award of Arbitrator Weaver is reprinted in the Appendix hereto as Appendix E, *infra* App. 17-28.

On April 19, 1990, the Petitioner filed a petition to vacate Arbitrator Weaver's award in the United States District Court, Eastern District of New York. On May 18, 1990, the District Court, in an unpublished opinion denied Petitioner's petition to vacate (App. 7-16). The District Court found, *inter alia*, that Arbitrator Weaver provided more than a colorable justification for not considering Medina's failure to seek interim employment on the basis that the Employer did not address this issue of mitigation at the time of the first arbitration (App. 13). The District Court stated in pertinent part that Arbitrator Weaver, at worst, erroneously construed Arbitrator Kupsinel's award when he held that Medina would be "made whole" if his back pay award was mitigated only by the amount of actual income Medina received while unemployed and not also by Medina's lack of effort to seek employment (App. 14). The District Court, found, however, that this would not establish a manifest disregard of the law (App. 14). Thereupon, Petitioner appealed to the Court of Appeals.

In an unpublished opinion the Court of Appeals noted that Arbitrator Weaver, in determining the amount of back pay owed concluded that any failure to mitigate by Medina need not be considered by Arbitrator Weaver because the Employer had failed to raise the issue in the initial arbitration and thus the Kupsinel award required full back pay minus any sums actually received by Medina. Moreover, the Court of Appeals held that Weaver's award was "probably correct and surely within his authority" because he had understood that Arbitrator Kupsinel had awarded Medina back pay without any reduction in potential interim earnings Medina might

have earned had he "tried harder to seek employment" (App. 2). Accordingly, the Court of Appeals affirmed the Order of the District Court (App. 1-3). Petitioner then filed a petition for rehearing and a suggestion for rehearing *in banc*. On December 17, 1990, the Court of Appeals entered an Order denying Petitioner's petition (App. 4-5).

REASONS FOR GRANTING THE WRIT

POINT I

THIS COURT SHOULD DECIDE WHAT LIMITS ARE TO BE APPLIED TO THE REMEDIAL AUTHORITY OF ARBITRATORS.

The Second Circuit, while recognizing that the standards for review of an arbitration award are severely limited, failed to apply the proper standard to determine whether the arbitrator herein acted within his authority to award backpay without inquiring into Medina's effort to locate work.

The Supreme Court, on several occasions, has enunciated the proper standard of review to be applied to arbitrator's awards. In over thirty (30) years since this Court issued the famous trilogy of cases, *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960); and *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) and *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court has adhered to a policy that an arbitrator's remedy must draw its essence from the collective bargaining agreement.

In those circumstances where an award deals with a remedy, the arbitrator is expected to bring his informed judgment to bear in order to reach a fair solution to the problem. *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, id at 597 (1960). As this Court has recognized, an arbitrator may bring special expertise to the formulation of an appropriate remedy. The Court noted that the drafters of the collective bargaining agreement may never have thought of what specific remedy would be required to meet a particular fact pattern constituting a violation of the collective bargaining agreement. However, this broad latitude in fashioning remedies is limited so that arbitrators cannot and should not dispense their "own brand of industrial justice." *Id.* The Supreme Court noted when an arbitrator's words manifest an infidelity to his obligation to draw its essence from the agreement, courts have no choice but to refuse to enforce the award. See *W.R. Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*, 461 U.S. 757 (1983).

This issue of whether the award, particularly the remedy, draws its essence from the contract, is an especially difficult one. As the Supreme Court has said:

> "So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect. If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined. Furthermore, it must be remembered that grievance and arbitration procedures are part and parcel of the ongoing process of

> collective bargaining. It is through these processes that the supplementary rules of the plant are established. As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement *must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice.* But as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision" (emphasis added).

United Paperworkers International Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 38 (1987).

Indeed, the Court has never directly passed upon an issue similar to that presented here. While the *Misco* decision is insightful to this Court's thinking, *Misco* is a different case from that at the bar. Both cases are founded on the fundamental question of whether the arbitrator's award "draws its essence from the collective bargaining agreement." Thereafter, the cases are different: in *Misco*, there were no limitations in the collective bargaining agreement or otherwise on the arbitrator's authority; in the instant case, there are numerous limitations on the arbitrator's authority or otherwise. In *Misco*, the parties stipulated that the issue before the arbitrator was whether there was just cause to discharge Cooper because of alleged drug possession, and "if not, what, if any, should be the remedy." In *Misco*, the Court felt duty bound to affirm the arbitrator's finding of no just cause, and the arbitrator's order of reinstatement, back pay and full seniority to Cooper. Said the Court, "The parties did not bargain for the facts to be found by a court, but by an

arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems." The Court did note that the parties to the applicable collective bargaining agreement in *Misco* could have, but chose not to set procedural rules such as specific remedies for the arbitrator to follow.

Here, the parties, in their collective bargaining agreement, agreed to specific limitations on the arbitrator's authority, but the arbitrator declined to be bound by them. In their collective bargaining agreement, Section 14.6, the parties limited the arbitrator's authority in that the arbitrator could not modify the collective bargaining agreement, nor could he deprive the Employer of any Common Law rights he previously had. Section 14.6 of the collective bargaining agreement is reprinted in the Appendix hereto as Appendix G, *infra* App. 56.

Moreover, when the Weaver arbitration commenced, it was with the clear understanding between the parties that mitigation would be considered as a prerequisite to any potential backpay award to Medina. Failing to require mitigation, the arbitration award cannot stand. This Court should grant certiorari to clarify an arbitrator's duties and obligations under both contract and the law.

POINT II

MITIGATION OF DAMAGES IS AN ACCEPTED PRINCIPLE OF THE COMMON LAW

The courts below failed to address the Employer's contention that Arbitrator Weaver's award deprived the

Employer of its Common Law right to mitigation of damages and thus the award manifested a disregard for the law.

Black's Law Dictionary, Sixth Edition, defines "Common Law" in part, as follows:

> As distinguished from statutory law created by the enactment of legislatures, the common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and, in this sense, particularly the ancient unwritten law of England. In general, it is a body of law that develops and derives through judicial decisions, as distinguished from legislative enactments. The "common law" is all the statutory and case law background of England and the American colonies before the American revolution.[3]

It is hornbook law that an injured party may not recover for loss that which could have been avoided "without undue risk, burden, or humiliation," except to the extent that "he has made reasonable but unsuccessful efforts to avoid loss." *Restatement (Second) of Contracts Section 350* (1979). As a general rule of law, a party will not be permitted to recover for losses that he could have avoided by reasonable efforts.

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[3] *Blacks Law Dictionary*, (West Pub. Co. 6th ed. 1990) page 227.

This general concept of mitigation has been engrafted upon the Common Law of employment discharge litigation. As some commentators have stated, the concept of mitigation is no more than a statement of the rule of avoidable consequences.

> "The employee need not look for work; he may sit idly at home if he so desires and, in doing so, violates no "duty" to the employer. The doctrine of avoidable consequences is simply a statement of how damages will be measured in a suit against the employer for breach of the employment contract. When the doctrine applies, it has been stated that no longer is the breach the cause of loss of employee's wages; those wages were lost by reason of the employee's failure to use reasonable diligence to find other similar employment. Thus, a wrongfully dismissed employee who unjustifiably refuses to accept similar employment will have the amount that would have been earned in the new position deducted from any damage award."

22 *Am Jur. 2nd* Section 516 (footnotes omitted). Of course, the common law contemplates that in situations where the employee cannot find a new position, or puts his initial position at risk by looking for a new position. then no reduction in damages would occur.[4]

New York State's Chief Justice Benjamin Cardozo wrote a concurring opinion sixty years ago in *McClelland v. Climax Hosiery Mills*, 252 NY 349, 169 NE 605 (1930), setting forth the Common Law of employment damages:

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[4] See also 36 NY Jur. 2d, *Damages*, Sections 21-24; Calamari and Perillo, *The Law of Contracts* (West Pub. Co. 3rd ed. 1987), Sections 14-15 through 14-19.

"The final question is this: Does a servant's refusal to accept other employment amount to an extinguishment of liability for damage actually suffered, or to disproof of the claim that damage to the extent demanded was actually suffered? Plainly, I think, the latter. Upon a wrongful discharge of servant during the term of employment, the prima facie measure of damage is wage that would be payable during the remainder of the term. *Howard v. Daly*, 61 N. Y. 362, 371, 19 Am. Rep. 285; *Milage v. Woodward*, 186 N. Y. 252, 257; *Warren v. Stoddart*, 105 U. S. 224, 26 L. Ed. 1117. This is only the prima facie measure. There is no fixed and certain obligation on the part of the master to respond in damages for that amount. The obligation of the master is merely to pay whatever damages have actually been suffered, and these exclude damages that a servant, acting reasonably, would have diminished or avoided. Proof of a prima facie case will charge the master with a duty of going forward with the evidence. This does not mean that he has the burden of proof in the strict sense, a burden that would require him to plead the matter to be proved. *Whitlatch v. Fidelity & Casualty Co.*, 149 N.Y. 45, 50; *Irving v. Irving*, 90 Hun, 422, 35 N. Y. S. 744; 149 N. Y. 573, 43 N. E. 987.

The statement is made not infrequently in treatise and decision that servant wrongfully discharged is 'under a duty' to the master to reduce the damages, if he can. The phrase is accurate enough for most purposes, yet susceptible of misunderstanding, if emphasized too sharply. American Law Institute, *Tentative Restatement of the Law of Contracts*, 328. The servant is free to accept employment or reject it according to his uncensored pleasure. What is meant by the supposed duty is merely this: That if he unreasonably reject, he will not be heard to

> say that the loss of wages from then on shall be deemed the jural consequence of the earlier discharge. He has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer."

at p. 609-610.

Fifty years ago, this Court had the opportunity to consider the formulation of back pay under the then recently enacted National Labor Relations Act, 29 U.S.C., Section 151 *et seq.* In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court had the opportunity to review a Board position that did not penalize discharged employees for idleness. Said the Court:

> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."

at p. 197-198; *see also NLRB v. Arduini Manufacturing Corp.*, 394 F.2d 410, (1st Cir. 1968); *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966). In order to be entitled to back pay, a discharged employee "must at least make reasonable efforts to find new employment which is substantially equivalent to the position and is suitable to a person of his background and experience." *Southern Silk Mills, Inc.*, 116 NLRB 769, 773 (1956). Similarly, in *Flite Chief, Inc., et al.*, 246 NLRB 407 (1979), the discriminatee attempted to seek employment on an average of once a month. The Board held that this did not

constitute "reasonable diligence" and denied the employee entitlement to back pay.

Moreover, public policy is best served by a policy requiring mitigation of damages. To tolerate sloth, resulting in needless harm to an employer, does not benefit society as would requiring an unemployed worker to find employment. Society gains nothing from the payment for no services rendered. Rather, if an employee obtains employment, he and his family do not incur unnecessary suffering, and society's safety nets need not be engaged. However, if back pay is awarded without requiring a meaningful search for new employment, the Court is countenancing waste of our resources. Society's interests are best served by awarding back pay only if there is a meaningful search for work, which is absent here.

POINT III

BY FAILING TO CONSIDER MEDINA'S MITIGATION EFFORTS, THE SECOND CIRCUIT FAILED TO COMPREHEND THIS COURT'S DOCTRINE OF "MANIFEST DISREGARD FOR THE LAW" AS A GROUND FOR SETTING ASIDE AN ARBITRATOR'S AWARD.

This Court has emphasized that despite the judicial inclination to uphold arbitration awards, there are certain circumstances in which the Court will conclude it has no alternative but to set aside an arbitrator's award. This Court's decision in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) created a theory of law for vacating arbitration awards based upon the arbitration award's "manifest disregard for the law". See *Andros Compania Maritima, S.A. v. Marc Rich & Co.*, 579 F.2d 691, 704 (2d Cir. 1978).

Although the bounds of this ground have never been clearly defined, it means more than error or misunderstanding with respect to the law. *Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985); *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir. 1977) *cert. denied* 436 U.S. 948 (1978); *I/S Stavbury v. National Metal Converters, Inc.*, 500 F.2d 424, 432 (2d Cir. 1974). The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator. Moreover, the term "disregard" implies that *the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it* (emphasis added). *Bell Aerospace Company Division of Textron, Inc. v. Local 516*, 356 F.Supp. 354, 356 (W.D.N.Y. 1973), *rev'd on other grounds*, 500 F.2d 921 (2d Cir. 1974); *Merrill, Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930 (2d Cir. 1986). *See also Mangan v. Owens Trucking, Inc.*, 715 F.Supp. 436 (E.D.N.Y. 1989).

The principles that arbitrators are to be bound by "are to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests" (citations omitted) *Muschany v. United States*, 324 U.S. 49, 66 (1945), cited with approval in *W.R. Grace & Co. v. Local 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America, id.*

Moreover, the Second Circuit ignored its own teachings as to manifest disregard of public policy. *See Newsday, Inc. v. Long Island Typographical Union No. 915*, 915 F.2d 840 (2d Cir. 1990), *petition for cert. filed* January, 1991.

Other Circuits have held that arbitrators' awards should not be enforced in circumstances where defined public policies were not observed. Thus, the First Circuit vacated reinstatement of a postal worker convicted of embezzlement even though the award did not violate a particular statute. *United States Postal Service v. American Postal Workers Union, AFL-CIO,* 736 F.2d 822 (1st Cir. 1984). The First Circuit rejected the Union's contention therein that there must be a positive legal directive violated before a Court can overturn an arbitration award for public policy grounds. The Court noted that the public policy must be clear, but common sense must also be applied. 736 F.2d at 825. *Accord United States Postal Service v. National Association of Letter Carriers,* 847 F.2d 775 (11th Cir. 1988).

The Fifth Circuit has held that the reinstatement of a truck driver discharged for wrecking a company tractor-trailer and subsequently cited for drinking while driving constituted sufficient public policy to deny enforcement of an arbitration award of reinstatement. *Amalgamated Meat Cutters Local 540 v. Great Western Food Co.,* 712 F.2d 122 (5th Cir. 1983). *Accord Iowa Electric Light and Power Co. v. Local Union 204 of International Brotherhood of Electrical Workers,* 834 F.2d 1424 (8th Cir. 1987) (arbitrator's award requiring reinstatement of nuclear power plant employee who was discharged for violating federal safety regulations vacated on public policy grounds). *Accord General Teamsters, Chauffeurs, Warehousemen & Helpers, Local Union 249 v. Consolidated Freightways,* 464 F.Supp. 346 (W.D.Pa. 1979) where an employer discharged its drivers because they refused to drive trucks without mud flaps, as required by State law. The arbitration award upholding

these discharges was vacated because the practical effect of the award was to require the drivers to violate state law. *Id.* at 349. See generally, comment *Employment at Will in the Unionized Setting*, 34 Cath. U.L. Rev 979, 1004 (1985) authored by David L. Durkin.

Accordingly, the Court must grant the Writ in the instant matter to fully apply the doctrine of manifest disregard of the law.

POINT IV

THE ARBITRATOR'S AWARD FAILED TO DRAW ITS ESSENCE FROM THE CONTRACTS WHEN IT IGNORED THE COMMON LAW REQUIREMENT OF MITIGATION CONTAINED IN THE KUPSINEL AWARD AND THE COLLECTIVE BARGAINING AGREEMENT

As noted above, it is axiomatic that the arbitrator derives his authority from the collective bargaining agreement between the parties. In the circumstances of this case, Arbitrator Weaver drew his authority from the two "contracts" between the parties: (1) the award of Bertram Kupsinel, the first arbitrator who found that Medina had been unlawfully discharged and who ordered that Medina be reinstated and made whole and (2) the parties' collective bargaining agreement. If the award of Arbitrator Weaver arguably fulfills the mandate of the two underlying "contracts," a court must enforce it; however, if the Weaver award manifests infidelity to *either* of these underlying documents, it *must* be set aside. As will be more fully set forth below, the Weaver award demonstrates faithlessness to *both* the collective bargaining agreement and the Kupsinel award.

A. The Kupsinel Award Was Not Adhered To By Arbitrator Weaver.

Arbitrator Kupsinel found that the Employer improperly terminated Medina. Arbitrator Kupsinel's award directed the Employer "to make Medina whole for loss of pay;" it did not direct Slavin to "pay Medina 66 weeks of earnings" or to make him "more than whole."

The concept of making an employee whole in labor arbitrations is to put the employee in the same position that he would have been in had he not been improperly discharged. The regular rate of pay of the employee is considered as the basis of any claim, plus any additional wage emolument to which he would ordinarily be entitled. The wage is adjusted for increases which the employee would have received, but for his discharge.

In an ordinary case, where there is no question that an employee made a good faith attempt to mitigate his damages (as more fully discussed below), the concept of a make whole remedy is easily translated into a formula where simple arithmetic calculations can resolve the issue. Thus back pay due can be calculated as follows:

Gross back pay - interim earnings = net back pay.

Arbitrator Weaver, and the courts below, failed to comprehend what Arbitrator Kupsinel meant when he directed the Employer to "make George Medina whole . . . . " Arbitrator Weaver stated incorrectly that the Employer was under an obligation to move to clarify the Kupsinel award to affirmatively impose a duty to mitigate upon Medina. (Appendix E, App. 25). This is because Arbitrator Weaver failed to comprehend that the

duty to mitigate was *automatically* subsumed in the award of Arbitrator Kupsinel. Even when collective bargaining agreements provide that unjustly discharged employees "shall be paid for all time lost," arbitrators routinely find that a duty to mitigate exists. Stated Arbitrator Lewis Solomon:

> "It is commonly and generally recognized that the purpose of a contract provision calling for payment of 'all time lost,' when disciplinary action or discharge has been found to be without justifiable cause is to compensate and indemnify the injured employee and make him whole for loss of earnings suffered by him as a result of the inappropriate exercise of judgment by the Company. The loss of earnings is usually to be measured by the wages he would have earned for the period they were improperly denied to him, subject, however, to a recognized duty and responsibility reposed in the employee to mitigate, so far as reasonable, the amount of that loss. If, as a result of employee's action or inaction, he has failed to mitigate the loss, then to the degree of such failure he is himself partially responsible."

Love Bros., 45 Lab. Arb. (BNA) 751, 756 (1965).

Discharged employees, as with any person suing for breach of contract, have the same duty to mitigate damages. *Allegheny Airlines, Inc.*, 48 Lab. Arb. (BNA) 734, 739 (1967); *Bethlehem Steel*, 18 Lab. Arb. (BNA) 938, 941 (1952); *E.F. Hauserman Co.*, 64 Lab. Arb. (BNA) 1065, 1069 (1975).

Put simply, a discharged employee "cannot sit idly by and let back pay accumulate, taking a vacation, as it were, at the expense of the Employer." *Orlando Transit Co.*, 71 Lab. Arb. (BNA) 897, 900 (1978). When diligence

in seeking employment is lacking, entitlement to back pay will be denied. *Good Hope Refineries, Inc.*, 73 Lab. Arb. (BNA) 1171 (1979); *see also Public Service Co. of New Mexico*, 70 Lab. Arb. (BNA) 788 (1978) and *In re Roskam Baking Company and Confectionery Workers International Union, Local 70*, 79 Lab. Arb. (BNA) 993, 999 (1982).

Contrary to the unfounded assertion of Arbitrator Weaver, the clear weight of arbitral authority did not require the Employer to seek clarification of Medina's duty to mitigate from Arbitrator Kupsinel. Rather, it is clear that Medina had a duty to mitigate under any reasonable interpretation of Arbitrator Kupsinel's use of the words "make whole."

Moreover, the Second Circuit's comment that Arbitrator Weaver probably correctly construed Arbitrator Kupsinel is incorrect. At the hearing before the Court of Appeals, the Union's Counsel conceded that at the Kupsinel hearing, there was no discussion, let alone evidence of Medina's efforts at mitigation. Rather, the parties litigated the issue of just cause for the discharge only, tacitly reserving mitigation as an issue to be considered later and only if Medina's discharge was not upheld.

The failure of Arbitrator Weaver to honor the concept of damage mitigation contained in the Kupsinel award, one of the underlying contracts herein, clearly shows that the arbitrator's award did not draw its essence from the collective bargaining agreement. In fact, Weaver's award shows infidelity to the Kupsinel award.

B. The Arbitrator Deprived The Employer Of Its Contractual Right To Common Law Mitigation Of Damages.

The collective bargaining agreement between the parties notes in the grievance procedure at paragraph 14.6:

> 14.6 The power and authority of the arbitrator shall be strictly limited to determining the meaning and interpretation of the explicit terms of this Agreement as herein expressly set forth. The arbitrator shall not have authority to add to or subtract from or modify any of said terms, *or to limit or impair any Common Law or other right* of the Company or the Union, or to establish or change any wage or rate of pay. (emphasis added) (Appendix G, App. 56).

The courts below failed to address the Employer's contention that by failing to require Medina to mitigate damages, the Employer was deprived of its Common Law right to such mitigation.

The contract between the parties provided that the employer retained all its common law rights, including its right to mitigation. By adopting the position of no mitigation as he did, Arbitrator Weaver effectively modified the collective bargaining agreement between the parties. Simply put, he denied the Employer its right to apply the common law of damages to the situation. The arbitrator's award, by ignoring such a crucial concept, could not draw its essence from the collective bargaining agreement.

As noted above, treatise after treatise adopts the concept of mitigation to be a standard for employment cases. As noted above, NLRB orders also require mitigation

such as do other employment statutes.[5] In addition, as more fully set forth above, the vast majority of arbitration authority requires that employees make an attempt to mitigate damages before they are entitled to recovery.

Clear precedent notes that when arbitrators rely upon some outside body of thought or feeling or law outside the contract, the arbitrator is then said to have failed to draw the award from the essence of the collective bargaining agreement, and the Court is duty bound to set aside the award. The Second Circuit's result herein is in direct contradiction of its own teachings. In *In re Marine Pollution Services, Inc.*, 857 F.2d 91 (2d Cir., 1988) the Second Circuit declined to enforce an arbitrator's award because the arbitrator imported his own notions of equity to the proceeding based on his desire to allow certain laid off employees opportunities for employment. The arbitrator ignored express contractual language in order to arrive at a more equitable result. The Second Circuit rejected that approach, noting that when it is clear that the arbitrator has ignored the express language of the contract, and relied upon some body of thought or feeling or law outside the contract, the arbitrator is then said to have failed to draw the award from the essence of the collective bargaining agreement, and the Courts are duty bound to set the award aside.

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[5] See, for example, Title VII of the Civil Rights Act of 1964, 42 USC Section 2000(e)-5(g). The Americans with Disabilities Act of 1990 has adopted the procedures of the Civil Rights Act of 1964. See Section 107. See also Age Discrimination in Employment Act, 29 USC Section 626.

In *Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board, Amalgamated Clothing and Textile Workers Union, AFL-CIO*, 724 F.2d 1217 (6th Cir. 1984), the collective bargaining agreement therein had a broad management rights clause stating that an employee may be discharged without redress if proven guilty of, among other things, insubordination. The contract also included a clause saying that no employee should be discharged except for just cause. Employee Childress refused an order of a supervisor, and was discharged. An arbitration ensued, and the arbitrator found that while insubordination did occur, discharge was too harsh a penalty. The District Court set aside the award, and the Circuit Court affirmed, noting that the reviewing Court must determine whether the award is fundamentally at odds with the collective bargaining agreement because arbitrators simply do not have the authority to disregard or modify plain and unambiguous provisions of a collective bargaining agreement. *See also Detroit Coil Co. v. International Association of Machinists, Lodge No. 82*, 594 F.2d 575 (6th Cir. 1979) *cert. denied*, 444 U.S. 840 (1979). A decision which fails to honor the Employer's contractually guaranteed common law right of mitigation cannot be said to have drawn its essence from the collective bargaining agreement and must, therefore, be vacated. *See also Ludwig Honold Mfg. Co. Fletcher*, 405 F.2d 1123 (3rd. Cir. 1967).

Accordingly, the Court must grant the Writ to clarify whether an award which ignores the Common Law right of mitigation can be said to draw its essence from the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Writ should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of November, one thousand nine hundred and ninety.

PRESENT:
HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
Circuit Judges.
HONORABLE RICHARD OWEN,
District Judge.*

- -

M. SLAVIN & SONS, LTD.,

Plaintiff-Appellant,

v.

ANTHONY CIRILLO, Individually and as President of United Seafood Workers, SMOKED FISH AND CANNERY UNION, LOCAL 359, UFCWIU, AFL-CIO,

Defendants-Appellees.

90-7568

FILED
NOV 2 1990

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ORDER

M. Slavin & Sons. Ltd. ("Slavin") appeals from the May 30, 1990, judgment of the District Court for the

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* Of the District Court for the Southern District of New York, sitting by designation.

Eastern District of New York (Edward R. Korman, Judge) denying its motion to vacate a labor arbitration award. On appeal, Slavin contends that the District Court erred in failing to find that the arbitrator's refusal to require mitigation of damages displayed manifest disregard for the law. We affirm.

The arbitration in question is actually the second arising out of Slavin's firing of George Medina. The first arbitrator, Bertram T. Kupsinel, directed Slavin to reinstate Medina and to make him whole for loss of pay. While Slavin eventually reinstated Medina, they failed to make the back pay award. A second arbitration, the one in question, followed. The second arbitrator, Robert S. Weaver, in determining the amount of back pay due, concluded that any failure to mitigate by Medina would not be considered here because Slavin had failed to raise the issue in the first arbitration and thus the initial arbitration award required full back pay (minus any sums actually received by Medina). Weaver understood Kupsinel to have ruled that Medina's back pay was not to be reduced by sums he might have earned had he tried harder to seek employment. Weaver's decision was probably correct and surely within his authority.

The standard of review of arbitration awards poses a high barrier to those challenging an award. An arbitrator's decision is overturned only if it displays a "manifest disregard" for the law. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). *See also United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987); *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*, 461 U.S. 757 (1983); and *United Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960). The

Second Circuit has noted that a " 'mere error in the law or failure on the part of the arbitrators to understand or apply the law' " does not constitute manifest disregard. *Siegel v. Titan Industrial Corp.*, 779 F.2d 891, 892 (2d Cir. 1985) (quoting *Drayer v. Krasner*, 572 F.2d 348, 352 (2d Cir.) (citation omitted), *cert. denied*, 436 U.S. 948 (1978)). The second arbitration award demonstrates appropriate decision-making on the part of the arbitrator.

The judgment of the District Court is affirmed.

N.B.: This Summary Order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in related cases before this or any other court.

/s/ Jon O. Newman

/s/ George C. Pratt
Circuit Judges.

/s/ Richard Owen
District Judge.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 17th day of December, one thousand nine hundred and ninety.

M. SLAVIN & SONS, LTD.,

Plaintiff-Appellant,

v.

ANTHONY CIRILLO, Individually and as President of UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION, LOCAL 359, UFCWIU, AFL-CIO

Defendants-Appellees.

DOCKET NUMBER
90-7568

FILED
DEC 17 1990

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Plaintiff-Appellant, M. SLAVIN & SONS, LTD.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard

the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

M. SLAVIN & SONS, LTD.,

Petitioner,

- against -

ANTHONY CIRILLO, Individually and as President of UNITED SEAFORD [sic] WORKERS, SMOKED FISH AND CANNERY UNION, LOCAL 359, UFCWIU, AFL-CIO,

Respondents.

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JUDGMENT

CV 90-1340 (ERK)

FILED
MAY 30 1990

A memorandum and order of Honorable Edward R. Korman, United States District Judge, having been filed on May 24, 1990 denying petitioner's application to vacate the arbitration award issued by Arbitrator Robert Weaver on January 29, 1990, it is

ORDERED and ADJUDGED that petitioner take nothing of respondent; and, that petitioner's application to vacate the arbitration award issued by Arbitrator Robert Waver [sic] on January 29, 1990 is denied.

Dated: Brooklyn, New York
May 25, 1990

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[NOT FOR PUBLICATION]

- -x

M. SLAVIN & SONS, LTD.,

Petitioner,

-against-

ANTHONY CIRILLO, Individually and as President of UNITED SEAFOOD WORKERS, SMOKED FISH AND CANNERY UNION, LOCAL 359, UFCWIU, AFL-CIO,

Respondents.

MEMORANDUM AND ORDER
90 CV 1340 (ERK)

- -x

Korman, J.

On November 7, 1986, George Medina was fired from his position as a truck driver for petitioner at its Brooklyn location. Respondents, the United Seafood Workers, Smoked Fish and Cannery Union, Local 359 of Greater New York and Vicinity, UFCWIU, AFL-CIO (hereinafter "the Union"), grieved Medina's termination pursuant to the provisions of the collective bargaining agreement in effect between petitioner and the Union. The parties were unable to resolve the grievance and the Union demanded arbitration.

On June 12, 1987, Arbitrator Bertram Kupsinel found that petitioner did not have just cause to discharge Medina. He "directed [petitioner] to offer George Medina reinstatement to his former position" and "to make George Medina whole for loss of pay and other benefits

from the date of his discharge to the date of the offered reinstatement." Petition to Vacate the Arbitration Award (hereinafter "Petition") at Exhibit B. The New York Supreme Court, Kings County, confirmed the award on November 18, 1987 and this decision was affirmed by the Appellate Division, Second Department on March 20, 1989. The New York Court of Appeals refused to hear the case.

Meanwhile, on February 16, 1988, petitioner offered Medina a position in its Manhattan location as a hand truck pusher. Although Medina accepted the position, the Union demanded that petitioner transfer him back to its Brooklyn location, reinstate him to his former position as a truck driver, and compensate him for his lost wages and benefits. On July 13, 1988, petitioner complied with the first two of these demands. The parties were unable to resolve the amount of money and benefits owed Medina, however, and the Union again sought arbitration to enforce the award of Arbitrator Kupsinel.

The stated issues at the second arbitration before Arbitrator Robert Weaver were whether petitioner had the right to reinstate Medina as a hand truck pusher rather than a truck driver and how much money and what benefits would "make George Medina whole" for his loss of employment. Hearing of September 21, 1989 at 3-11 (Petition at Exhibit D). Encompassed in the latter issue were: 1) whether petitioner was required to contribute to the Union's pension and welfare fund during Medina's period of unemployment; 2) whether Medina's award of back pay should be reduced by any earnings or payments received by him while unemployed; 3) whether

Medina was entitled to an award of overtime compensation that he would have earned had he been reinstated as a truck driver rather than a hand truck pusher; and 4) whether it was necessary to condition Medina's award of back pay on his effort to mitigate his loss by trying to find other employment. *Id.* Testimony was taken and evidence received on all of these issues.

On January 29, 1990, Arbitrator Weaver found that petitioner had not complied with Arbitrator Kupsinel's award and granted Medina: 1) the average overtime earnings of the three lower senior truck drivers from his reinstatement to his assignment as a truck driver; 2) back pay equal to the average of the three less senior drivers from the date of discharge to reinstatement; 3) lost contributions to the Union's welfare and pension fund; and 4) applicable interest. In his decision Arbitrator Weaver observed:

> Although the Arbitrator [Kupsinel] did not award this back pay less any interim earnings or in any other way mitigate the amount due, the Union would agree to a back pay award that was reduced by any earnings or unemployment amounts received during the period of discharge.
>
> The Union urges that the entire claim of the Employer regarding the Grievant's responsibility to mitigate [his] losses by seeking employment be dismissed. [Because] the award of the Arbitrator [did not require the Grievant to mitigate his losses by seeking employment, it] cannot now be amended [to include such a duty].

Opinion and Award at 4-5 (Petition at Exhibit C). Arbitrator Weaver then took exception with petitioner's argument in its brief that he had "assured" petitioner that he would consider what efforts Medina had made to find a job while unemployed in determining the back pay award. Arbitrator Weaver stated that the "singular issue" of the arbitration was compliance with the first award and that any claim to mitigate damages had to have been made in the original case when the cause for discharge was evaluated. *Id.* at 6-7.

Petitioner seeks to vacate the arbitration award issued by Arbitrator Weaver on the statutory ground of misconduct and on the judicially-created ground of "manifest disregard of the law." It claims that "[d]espite the understanding and agreement of the parties on the 'duty to mitigate' issue, . . . in his decision, dated January 29, 1990, Arbitrator Weaver renounced any obligation to consider the issue of mitigation of damages. Petition at Paragraph 23. Petitioner argues that the arbitration award should be vacated on the grounds of misconduct and manifest disregard of the law for two reasons: 1) because the arbitrator refused "to consider relevant evidence pertinent and material to the controversy regarding Medina's failure to mitigate damages" (Paragraph 25); and 2) because the arbitrator "exceeded his authority by awarding interest and 'late charges' in his award" (Paragraph 27). In response, the Union claims that all the arbitrator did "in interpreting the Kupsinel Award as a predicate to determining compliance or non-compliance, was to reject the Employer's arguments and to accept the Union's arguments." Respondent's Memorandum of Law at 6. It also argues that judicial review of arbitration

awards is severely limited and none of the reasons compelling vacatur are present in this case. *Id.* at 7.

Discussion

In *Concourse Beauty School, Inc. v. Polakov*, 685 F. Supp. 1311, 1315 (S.D.N.Y. 1988), Judge Ward summarized when and why arbitration awards will be vacated by courts:

> Courts may vacate an arbitration award only upon a showing of one of the statutory grounds listed in the Arbitration Act, 9 U.S.C. § 10, or if the arbitrators acted in manifest disregard of the law . . . or if the award is incomplete, ambiguous, or contradictory. The grounds to vacate an award are strictly limited in order to avoid frustrating the basic purpose of arbitration, disposing of disputes quickly and avoiding the expense and delay of litigation. [T]he party moving to vacate bears the burden of proof.

Id. at 1315 (citations omitted). Petitioner alleges misconduct under 9 U.S.C. § 10, which provides:

> [T]he United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–
>
> . . .
>
> (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

9 U.S.C. § 10(c) (1970). The district courts have held that an arbitration award will not be upset unless the alleged misconduct "so tainted the fundamental fairness of the

arbitral process as to warrant vacation of the award." *Reichman v. Creative Real Estate Consultants, Inc.*, 476 F. Supp. 1276, 1285 (S.D.N.Y. 1979); *see Teamsters, Chauffeurs, Etc. v. E.D. Clapp Corp.*, 551 F. Supp. 570, 577-78 (S.D.N.Y. 1982) (Arbitrator violated 9 U.S.C. § 10(c) because his refusal to hear pertinent and material evidence violated principles of fundamental fairness and deprived the Union of a full opportunity to present its case).

Here, petitioner does not allege that it was barred from presenting all of its evidence on mitigation. It merely alleges that the evidence of Medina's failure to look for employment was not properly considered by the arbitrator. Because petitioner has not demonstrated that the arbitrator's decision on the issue of back pay violated principles of fundamental fairness or deprived petitioner of a full opportunity to present its case, the petition is dismissed as to this claim.

Petitioner also alleges that the arbitrator's decision was in "manifest disregard of the law." *Wilko v. Swan*, 346 U.S. 427 (1953). The Court of Appeals interpreted this standard in *Andros Compania Martima v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2nd Cir. 1978):

> [W]e acknowledged in *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1214 (2nd Cir. 1972) that "if the arbitrators simply ignore the applicable law, the literal application of a 'manifest disregard' standard should presumably compel vacation of the award." But this much is at least certain: When arbitrators explain their conclusions (we reaffirmed in *Sobel* that they have no obligation

> to do so) in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result.

Id. at 704. *See Mutual Redevelopment Houses Inc. v. Local 32B-32J, Service Employees International Union, AFL-CIO*, 700 F. Supp. 774, 777 (S.D.N.Y. 1988) ("If there are several possible interpretations of an arbitration award, the ambiguities must be resolved, if possible, in a manner supporting the award.") (citations omitted).

Petitioner's claim on this ground fails because Arbitrator Weaver supplied more than a colorable justification for the outcome he reached. As he explained in his decision:

> It is undisputed that arbitrators, including the undersigned, have on occasion modified a back pay finding based on some good faith effort by the Grievant to mitigate his damage claim. However, it should be emphasized that such a finding is made in the original case where cause for discharge is evaluated. In this case Arbitrator Kupsinal (sic) heard the case to determine whether there was cause for the discharge of the Grievant. The Arbitration Award of this Arbitrator [citation omitted] does not indicate that the Employer made any motion to have their losses mitigated by the inaction of the Grievant seeking employment. . . . Any claim to mitigate a damage claim should and must be made by the damaged party on a timely basis, not two and one-half years later.

Opinion and Award at 7. Although petitioner attacks Arbitrator Weaver for "attempt[ing] to sidestep consideration of the (mitigation) issue by resorting to some

unsupported fiction like a 'time bar' . . . ," it does not present any objective evidence which would compel the conclusion that the arbitrator "appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 933 (2nd Cir. 1986) (citation omitted). At worst, Arbitrator Weaver erroneously construed the previous arbitrator's decision when he held that Medina would be "made whole" if his back pay award was mitigated only by the amount of actual income he received while unemployed and not also by his lack of effort to find employment. As Judge Leisure held under very similar circumstances:

> Plaintiff's contention that complete mitigation is required in the present case, which it supports by citation to allegedly analogous National Labor Relations Act cases, *e.g., Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271 (1941), does not rise to the level of defined and settled law that is necessary to establish manifest disregard.

Mutual Redevelopment Houses v. Local 32B-32J, Service Employees International Union, AFL-CIO, 700 F. Supp. 774, 778 (S.D.N.Y. 1988).

Petitioner also fails on its claim that the arbitrator exceeded his authority by granting interest on the back pay and overtime pay awards and by granting additional interest in the event that petitioner did not timely comply with the award. The Court of Appeals has not been receptive to such claims.

> We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards "[w]here the arbitrators

> exceeded their powers," 9 U.S.C. § 10(d), especially where that language has been invoked in the context of arbitrators' alleged failure to correctly decide a question which all concede to have been properly submitted in the first instance.

Andros Compania Maritima v. Marc Rich & Co., A.G., 579 F.2d 691, 703 (2nd Cir. 1978) (footnote omitted). In *Sperry International Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 905-06 n.3 (S.D.N.Y. 1982), due to the " 'relative paucity of precedents on the particular issue and the similarity of language with regard to judicial review between the federal [Arbitration] Act and the corresponding provision in the New York statute,' " quoting *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 413 n.3 (2nd Cir. 1980), Judge Pollack referred to state law to determine when an award will be vacated on the grounds that an arbitrator exceeded his authority to award damages. He quoted in length from *Rochester City School District v. Rochester Teachers Association*, 394 N.Y.S.2d 179 (1977), in which the New York Court of Appeals held that:

> [A] court may not vacate an award because the arbitrator has exceeded the power the court would have, or would have had if the parties had chosen to litigate, rather than arbitrate the dispute. Those who have chosen arbitration as their forum should recognize that arbitration procedures and awards often differ from what may be expected in courts of law.

Id. at 181. The Court of Appeals added the caveat that "[the arbitrator's] power to fashion a remedy is not unlimited. If the arbitrator's award is 'completely irrational' it may be considered misconduct on his part or it may be said that he exceeded his power. The relief which

he fashions is circumscribed by the bounds of the relationship between the parties." *Id.* at 182.

In this case, it was perfectly rational for Arbitrator Weaver to order 10% interest on the awards of back pay and overtime pay. Medina has been waiting for this money, totalling $47,500, for almost four years. The interest awarded approximates what petitioner has gained by withholding payment while appealing these awards. The second interest award designed to act as a penalty for further delay in payment is equally rational given petitioner's penchant for delaying payment by taking appeal after appeal. As an experienced participant in the arbitration arena, petitioner should know by now that judicial review is extremely limited and that an arbitration award will be vacated in only the most exceptional cases.

Accordingly, the petition to vacate the arbitration award is denied.

SO ORDERED:

/s/ Edward R. Korman
EDWARD R. KORMAN,
U.S.D.J.

Dated: Brooklyn, New York
May 18, 1990

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION

Case No. 13 300 00618 88

In the matter of the Arbitration between: M. SLAVIN & SONS, LTD. -and- UNITED SEAFOOD WORKERS, SMOKED FISH & CANNERY UNION, LOCAL 359 OF GREATER NEW YORK AND VICINITY, UFCWIU, AFL/CIO	OPINION and AWARD

ARBITRATOR

Robert S. Weaver

HEARINGS

September 21, 1989
October 31, 1989
November 2, 1989

AWARD

January 29, 1990

APPEARANCES

For the Union: J. Kenneth O'Connor, Esq.
George Medina
Anthony Cirillo

For the Employer: Arthur R. Kaufman, Esq.
Elliot J. Mandel, Esq.

EXHIBITS

J-1: Arbitration Award, AAA Case No. 1330 1515 86, 6/23/87

J-2: Collective Bargaining Agreement between the parties, 1985-88

J-3: Telegram to George Medina from Herbert Slavin, 2/16/88

J-4: Individual Tax Return re: George Medina, 1988

J-5: Individual Tax Return re: George Medina, 1986

J-6: Individual Tax Return re: George Medina, 1985

U-1: Individual Tax Return re: George Medina, 1987

E-1: Subpoena to Mrs. George Medina

E-2: Subpoena to George Medina

E-3: Subpoena to Fulton Fish Market Funds

E-4: Subpoena to Anthony Cirillo

E-5: Letter to George Medina from Lourdes Martinez, 1/29/88

E-6: Sample Pension/Welfare Form

E-7 (a)-(q) New member list for Union 11/86 through 2/88

E-8: Compilation of records 11/7/86 through 2/26/88

E-9: Compilation of New York Daily News ads for employment, 11/2/86 through 2/21/88

E-10: (a) – (h) Regular and overtime earnings for G. Medina, J. Wilson, A. Garcia and A. Sanchez for 1985 and 1986.

ISSUE

The undersigned Arbitrator, duly selected and designated in accordance with the Agreement (J-1) between the parties, held hearings on 2/21, 10/31 & 11/2/1989; at which time opportunity was offered for the presentation of argument, testimony and proof relative to the following:

> Did the Employer properly comply with the reinstatement Award of Arbitrator Kupsinal (AAA 1330 1515 86) regarding George Medina? If not, what shall be the remedy?

DISCUSSION

On or about November 10, 1986, George Medina (Grievant) was discharged by M. Slavin & Sons, Ltd. (Employer). Through his Union (UFCW, Local 359) a grievance was filed and eventually became the subject of arbitration. Under the terms of the Collective Bargaining Agreement the Arbitrator was appointed by the American Arbitration Association to hear and decide whether there was just cause for the discharge. On June 23, 1987 the Arbitrator issued the following Award:

> J-1
>
> "The Company did not have just cause to discharge George Medina.
>
> The Company is directed to offer George Medina reinstatement to his former position
>
> The Company is directed to make George Medina whole for loss of pay and other benefits from date of his discharge to the date of the offered reinstatement."

The Employer moved to have the Award vacated and after some time in litigation the Supreme Court of the State of New York affirmed the Award and issued judgment thereon December 2, 1987. The Union had moved to have the Award enforced but there is no record of any action on this motion. The Union then moved through the grievance procedure to the American Arbitration Association to have an Arbitrator appointed to hear and decide "compliance of Arbitration Award". The undersigned Arbitrator was appointed under the AAA Rules on July 22, 1988. Significant delays and scheduling difficulties were experienced in holding the hearings to decide the issue in this case. Finally, on September 21, 1989 the first hearing was held and the third and final hearing was held on November 2, 1989. Both parties filed briefs following the last hearing.

Considerable discussion was held by the parties with respect to framing the issue to be placed before the Arbitrator. For the most part the discussion related to the arguments of each party as to what compliance actually meant and what was to be considered in reviewing the claim of each party. The Issue as listed above has been framed by the Arbitrator with the understanding that all points advanced by the parties would be considered.

The Arbitrator has carefully reviewed all evidence, testimony and arguments by brief of the parties even though all such items may not be referenced in this Award.

UNION POSITION

The Union maintains the Employer failed to implement any part of the Award as directed by the Arbitrator. First, the Grievant was not reinstated to his "former position" which was that of a truck driver at Belmont Avenue in Brooklyn. Rather, the Grievant was reinstated as a laborer in the Fulton Fish Market in Manhattan. Granted, there is little difference in base rate but overtime is lacking in the Market and is common as a truck driver. Accordingly, the Grievant was not reinstated to his former position and additionally was denied overtime for approximately six months before he was assigned as a truck driver.

The Union claims the Grievant should be made whole for his loss of overtime from the time of reinstatement (2/16/88) to July, 1988, when he was assigned as a truck driver. The Grievant has not to date received any back pay for the period of his discharge. The Union argues the Grievant should be awarded back pay for the period of 11/6/86 through 2/16/88 at the average of the monies received by the next three lower employees in the classification of truck driver. Additionally, the Union seeks contributions to the Local 359 Welfare and Pension Funds for this period.

Although the Arbitrator did not award this back pay less any interim earnings or in any other way mitigate the amount due, the Union would agree to a back pay award that was reduced by any earnings or unemployment amounts received during the period of discharge.

The Union urges that the entire claim of the Employer regarding the Grievant's responsibility to mitigate their losses by seeking employment be dismissed. Such was not the award of the Arbitrator and cannot now be amended by this Arbitrator.

The total amount due, considering the aforementioned position of the Union totals $47,500.00 plus Union Welfare and Pension amounts. Additionally, the Union seeks an Award with interest added to this amount at a reasonable rate.

EMPLOYER POSITION

The Employer notes the testimony of the Grievant clearly illustrates that he made little if any significant effort to obtain employment during his period of discharge. He testified that for the first seven months following the discharge he relied only on unemployment compensation and made no effort to find employment. Following this period his efforts were sporadic at best. He would spend a few minutes a day reading the newspaper ads and make a few phone calls. He only went to a few employers to inquire for a job. By his own testimony this took only one-half to one hour per day. He went to the Fulton Fish Market on only two occasions and then did not inquire of his Union whether they would assist him. Testimony by the Union President revealed that he, on many occasions, assisted persons to find a job for the day. In fact, the records of the Union show that many persons were hired by various employers in the Market while the Grievant was discharged. The Employer concludes the fact that the Grievant did not work during the discharge

was not for lack of job opportunities, rather his lack of interest in finding a job.

The Employer claims there is generally accepted arbitrable precedent and contract law to support their argument that the Grievant had an obligation to mitigate his damage claim against the Company. A number of citations of Arbitration Awards were offered in support of this position by the Employer along with the general conclusions contained in Elkouri and Elkouri, *How Arbitration Works*. Since this Grievant did little, if anything, to mitigate his damage claim it is the position of the Employer that they should not be responsible for back pay.

The Employer agreed with the Union that the back pay (if any) for regular working hours would be calculated by averaging the earnings of the next three drivers lower on the seniority list. The Union goes further and says the average of these three lower senior employees should include overtime. The Employer disputes this position since the Grievant had a history of not working as much overtime as these three employees. In fact, his average hours worked prior to his discharge was only 43.7% of the average of the other three drivers. Accordingly, any back pay award should not exceed the average of regular hours plus 43.7% of the average overtime for the three.

The record shows the Grievant took two positions while discharged at less than his regular earnings at Slavin. The Employer would agree that he was due a different from this wage and his wage at Slavin. This further proves that he could have obtained a job even at a

lower wage and he would have made a reasonable effort to mitigate his damage claim. Since he did not make any effort beyond the two jobs, it is the position of the Employer that they are not obligated for back pay – except for a difference in pay for the two jobs he did hold. The Employer urges the claim for back pay be denied.

OPINION

The Arbitrator takes exception to the discussion of the *ISSUE* as contained on page three of the Employer Brief.

> The arbitrator assured the Employer that within the proposed submission he would consider what efforts if any, Medina made to seek interim employment, and such efforts if any, Medina made to seek interim employment, would determine how much, if any, back pay Medina would be entitled to. Within those caveats, the parties stipulated to the issue."

It is suggested the Transcript be reviewed. Such a review will not support the above conclusion that the Arbitrator would agree that job seeking efforts would reduce the obligation for back pay. It was agreed that the arguments and contentions of each party would be considered in arriving at a finding for this dispute. There was no absolute statement at this early stage in the first hearing that a claim of either party would necessarily frame an Award. The Transcript clearly shows that the Arbitrator was left to frame the issue and clearly indicated the singular issue would involve compliance with the prior Arbitrator Award.

It is not disputed that arbitrators, including the undersigned, have on occasion modified a back pay finding based on some good faith effort by the Grievant to mitigate his damage claim. However, it should be emphasized that such a finding is made in the original case where cause for the discharge is evaluated. In this case Arbitrator Kupsinal [sic] heard the case to determine whether there was cause for the discharge of the Grievant. The Arbitration Award of this Arbitrator (J-1) does not indicate that the Employer made any motion to have their losses mitigated by the inaction of the Grievant in seeking employment. Several months had passed from the discharge to the hearing and it is now this same period that the Employer maintains the Grievant did nothing to find employment. Any such claim to mitigate a damage claim should and must be made by the damage party on a timely basis, not two and one-half years later.

This Arbitrator will offer no comment or opinion regarding the Arbitration Award of Arbitrator Kupsinel that was issued on June 23rd of 1987. However, the period from then to present was clearly the responsibility of the Employer. They did not agree with the findings and processed this claim through the court system of the State of New York. At any given point the Grievant had good reason to be of the opinion that his back to work with pay award would be implemented by the Employer. In his mind, and with Union support, he had been vindicated and would soon be back to work. His desire to seek full time permanent employment would naturally be diminished to a point near zero.

This Arbitrator has the singular task of evaluating the Award of the prior Arbitrator and making a finding

as to its meaning. First, the Employer was directed "to offer George Medina reinstatement to his former position." His former position was that of a truck driver at Belmont Avenue in Brooklyn – not that of a laborer, or any other position, in Manhattan. This was clearly in conflict with the direction of Arbitrator Kupsinal. Thus, his back pay award from this Arbitrator will include a loss of wages for this approximate six months. The difference in his overtime offerings will be considered in full. It will not be questioned whether the Grievant accepted or was offered as much overtime as the three lower drivers, as it is also not known whether he would have accepted this overtime during the six months he was assigned to Manhattan.

Finally, "The Company is (was) directed to make George Medina whole for loss of pay and other benefits from date of his discharge to the date of the offered reinstatement." This Award did not mitigate the make whole requirement by any outside factors. This Arbitrator will mitigate the Award, as agreed by the Union, by deducting any earnings received during the period and for unemployment compensation received. However, aside from these two items the Employer is directed to pay the Grievant his total loss of pay based on the earnings of the three less senior drivers on average. According to the parties this represents a total of $47,500.00. The Union has requested an additional remedy to include payment to the Welfare and Pension Fund of the Union and interest to the back pay award to the Grievant. Both are reasonable demands and will be awarded. The Employer is directed to make the Union Welfare and Pension Fund whole for contributions for the Grievant for

his period of discharge. In addition, the Employer is to pay an interest penalty to the Grievant in the amount of 10% over and above the $47,500.00 in back pay. The Arbitrator must consider that the Employer may seek judicial review of this finding and further delay the payment to both the Grievant and the Union Welfare and Pension Fund. Accordingly, failure to make both whole within thirty (30) days of this Award will require the Employer to be obligated to pay interest on each amount at the rate of 8/10% per month compounded from the 31st day following the issuance of this Award.

AWARD

The Employer did not properly comply with the reinstatement Award of Arbitrator Kupsinal (AAA 1330 1515 86) regarding George Medina.

1. George Medina is awarded the average overtime earnings of the three lower senior truck drivers from his reinstatement to his assignment as a truck driver.

2. George Medina is awarded back pay equal to the average of the three less senior drivers from the date of discharge to reinstatement.

3. Both of the above (1 & 2) are to be increased by 10% for interest.

4. The Union Welfare & Pension Fund is to be made whole for all lost contributions during the period of discharge.

5. Should the Employer fail to comply with the above within thirty (30) days of this Award,

interest to all of the above shall be added at the monthly rate of 8/10%

/s/ Robert S Weaver
Robert S. Weaver
January 29, 1990

40 Brophy Dr.
Trenton, NJ 08638

Sworn and Subscribed to Before Me on this 29th day of January, 1990.

/s/ Vergie M. Weaver
VERGIE M. WEAVER
NOTARY PUBLIC OF
NEW JERSEY
My Commission Expires
May 14, 1992

APPENDIX F

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

UNITED SEAFOOD WORKERS,
SMOKED FISH & CANNERY UNION,
LOCAL 359 OF GREATER
NEW YORK AND VICINITY, UFCWIU, AFL-CIO

and

M. SLAVIN & SONS, LTD.

CASE NUMBER: 1330 1515 86

AWARD OF ARBITRATOR

THE UNDERSIGNED ARBITRATOR(S), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and effective from December 1, 1985 through November 30, 1988 and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARDS as follows:

> The Company did not have just cause to discharge George Medina.
>
> The Company is directed to offer George Medina reinstatement to his former position.
>
> The Company is directed to make George Medina whole for loss of pay and other benefits from the date of his discharge to the date of the offered reinstatement.

STATE OF NEW YORK)
) ss.:
COUNTY OF Westchester)

I, Bertram T. Kupsinal [sic], do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

June 23, 1987 /s/ Bertram T. Kupsinel
(Dated) (Signature of Arbitrator)

FOR USE IN NEW YORK STATE

AMERICAN ARBITRATION ASSOCIATION
Voluntary Labor Arbitration Panel

In the Matter of the Arbitration between UNITED SEAFOOD WORKERS, SMOKED FISH & CANNERY UNION, LOCAL 359 OF GREATER NEW YORK AND VICINITY, UFCWIU, AFL-CIO (Union) and M. SLAVIN & SONS, LTD. (Company)	OPINION AND AWARD Case No. 1330 1515 86

APPEARANCES

FOR the Union

O'Connor & Mangan
by J. Kenneth O'Connor, Esq.

FOR the Company

Kaufman, Frank, Schneider
& Rosensweig, P.C.
by Neil M. Frank, Esq.

THE ISSUE

The Parties stipulated that the issue is as follows:

"Did the Company have just cause to discharge George Medina? If not, what shall be the remedy?"

THE FACTS

The Parties stipulated that the termination notice to the Union was received on or about November 10, 1986. It reads as follows:

"United Seafood Workers Union
140 Beekman Street
New York, New York 10038

Attention: Mr. Tony Cirillo
Mr. Dennis Faiccio

Gentlemen:

Mr. George Medina was fired from M. Slavin & Sons for theft of services and not following company work rules and regulations. As you know, Mr. Medina was given more chances to correct his behavior and his general work attitude.

Please advise us as to your position on this matter.

Respectfully yours,

M. SLAVIN & SONS, LTD.

s/Mel Tortorici
Mel Tortorici"

The Company called as its first witness George Medina, the Grievant. Medina was hired as a truck driver and delivery man on June 6, 1980. The Company sells fish to various restaurants and private customers throughout the metropolitan area. The termination form, which the Grievant refused to sign, reads as follows:

"M. SLAVIN & SONS LTD.
FINAL TERMINATION NOTICE

TO: Georgie Medina 9:15 a.m.
EMPLOYEES NAME TIME

FROM: Barry Slavin DATE 11/7/86

REASON FOR FINAL TERMINATION NOTICE:

Found goofing off on Pitkin Ave. while on Co. time.

Taking too much time to do a run in (Bklyn)

Formal letter to follow.

From: Signature s/Barry Slavin

I have read this final termination notice and understand it completely and that any future disciplinary action taken by the company could lead to my Termination of Employment at M. Slavin & Sons Ltd.

Employee Signature (Refused to Sign)

Date 11/7/86 "

Medina testified that he has worked continuously and his only termination was in November, 1986. He was suspended for about two days about two weeks before he was discharged. He was asked if he was suspended in 1983. He stated that he didn't recall, but that he wasn't

suspended, he just had no drivers license so he couldn't work. He was discharged on a Friday, after he punched in. (Friday was November 7, 1986.) On Thursday he had about 12 stops, but did not recall the names of the customers. He was shown a stack of invoices. He was not sure if they were the same ones for the deliveries he made on Thursday. He testified in detail about how long it took to make the deliveries stated on the invoices. He couldn't find the first stop – President Caterers and spent about one half hour looking for it. He didn't remember the time when he finished the deliveries. He didn't remember when he punched in. He is allowed one hour for lunch and takes lunch when he finishes the run – that is the rule. His time card showed that he punched in at 8:50 a.m. and punched out at 6:46 p.m. On that day, he didn't leave the store until 10:15 a.m. He added, "I remember very clearly, like it was yesterday." Medina said there were more stops than the invoices he was shown, there were two more private stops and another regular stop, but he couldn't remember the names. He finished his last stop about 6:15, then he came back to the store which took about 20 to 25 minutes. He did stop at Pitkin Avenue in a beauty parlor, where his wife was having her hair done. He was there about five minutes or not even that. At this point, Medina was asked about invoices and deliveries made on Wednesday, November 5, 1986 and on Tuesday, November 4, 1986. Medina stated that he did receive a copy of the Company's work rules on Monday or Tuesday of the week he was fired. (The "Discipline and Safety Rules" are dated September 23, 1985.) Medina did not remember if he received the rules earlier. He acknowledged that he had signed that he

received a copy of the rules. (A list of signatures, including Medina's, is not dated.) It took him about four to five minutes to get from the beauty parlor to the Company's premises and it took him five to ten minutes to park the truck. He was asked if he had ever been given a final warning for poor performance. He paused and then said, "They did give me a letter." Two letters, both dated July 1, 1986 read as follows:

> "Mr. George Medina
> 85 Bristol Street – Apt. 6C
> Brooklyn, New York 11212
>
> Dear Mr. Medina:
>
> Let this correspondence serve as an official notice for the meeting that was held on June 30, 1986 with Dennis Faicco, representative of Local 359 U. F. C. W., myself, your shop steward Hector Ortiz, and George Delorenzo; in regard to continuously failing to comply with company standards. They are the following:
>
> 1) Failure to test your beeper at the start of each work day and answer your beeper when being paged.
>
> 2) Filling out your daily driver's log as outlined by the company.
>
> 3) Notifying the company if there is a problem with a customer or when delivering the product.
>
> Further continuation of any of the above-mentioned shall result in immediate discharge from the company without any severance pay.
>
> Very truly yours,
> M. SLAVIN & SONS, LTD.
> s/Mel Tortorici
> Mel Tortorici

MT/ta
cc: Mr. Herbert Slavin
Mr. Dennis Faicco
Mr. Hector Ortiz"

"I, George Medina, am fully aware of the memo served to me dated June 30, 1986, regarding my failure to comply with company standards.

I am aware of all the conditions and agree to adhere to company policies or face permanent discharge without severance pay.

Signed: s/George Medina
George Medina

Witness: s/I. Atanasio, Jr.
Ignacio Atanasio, Jr.

cc: Mr. Herbert Slavin
Mr. Dennis Faicco
Mr. Hector Ortiz
Mr. Mel Tortorici"

He understood that a further violation would result in his discharge. He was asked, "Were you ever warned after that?" He replied, "No." He was asked if he had received a written warning before July 1, 1986. He replied, "I don't remember." He was asked, "Were you warned by anybody?" He answered, "I don't recall." He was the [sic] shown a document, dated July 14, 1986. It reads as follows:

"M. SLAVIN & SONS LTD.
FINAL WARNING NOTICE

TO: Georgie Medina
EMPLOYEE NAME TIME

FROM: Mel Tortorici DATE 7/14/86

REASON FOR FINAL WARNING NOTICE:

Leaving his truck in the middle of the parking lot. Not following rules and regulations in regard to parking his truck. Leaving windows open and truck unattended. Obstructing yard so no other trucks could park.

From: Signature s/Mel Tortorici

I have read this final warning notice and understand it completely and that any future disciplinary action taken by the company could lead to my (Termination!) of Employment at M. Slavin & Sons Ltd.

Employee Signature

[signature illegible] Date [illegible]"

Medina said he remembered this. He was then asked if he had a written warning in March, 1986 for being absent and not notifying the Company or calling in. He recalled that he signed this document, which reads as follows:

"M. SLAVIN & SONS LTD.
WRITTEN WARNING NOTICE

TO: George Medina 3/27/86
EMPLOYEES NAME TIME

FROM: _____ DATE _____

REASON FOR WARNING NOTICE:

Not notifying Company when absent from work. Not calling in.

From: Signature s/Mel Tortorici

Date 3/27/86

I have read this written warning and understand it completely.

Employee Signature s/George Medina

Date_____"

He was asked if he was ever talked to about leaving his truck in the middle of the parking lot. He answered, "I never left the truck in the middle of the lot – but I signed the warning notice." He was talked to by Mel TORTORICI about not calling in when absent – but he had called in. He signed the notice because he had to. He did not remember if he had been put on probation in 1985. He was shown a letter dated July 12, 1985 but stated that he had never seen this letter before. He was talked to by Barry Slavin and Mel TORTORICI about failing to respond to his beeper. He was asked if he was ever talked to by Junior (Ignacio Atanasio, Jr.). He replied, "Not that I recall." He was asked, "Did Junior check your beeper – in your presence – to see if it was operating?" He replied, "Not really – not that I remember." He was asked, "Did Mel Tortorici check your beeper?" He answered, "No."

The first time he had to fill out a daily log was in the week that he was fired. Before that, he didn't have to. The Company had no record of where he was and at what time. He was asked if he was ever talked to by Junior for being slow on routes. He replied, "I don't remember." He conceded that his routes had been changed. He had been talked to by Barry Slavin about parking tickets in Manhattan. He was asked, "You never had to fill out any kind of log?" He answered, "Yes – sometimes on computer papers." Sometimes he never got one (to fill out). When he did get them, he used to put in the time. This was about a year to six months before he was fired. He was asked if there were complaints from customers about his service. He replied, "No – not that I know of." He then

was asked, "Was there a complaint from Horn & Hardart?" He replied, "Yes, their complaint was that someone peed in the elevator and I was accused. Barry did talk to me about that." He was asked, "Was there a complaint from Blue Cross?" He answered, "No." He was then asked, "Did Barry Slavin talk to you about a complaint from Blue Cross?" He answered, "No."

At this point in the arbitration, the Company called as its next witness Ignacio Atanasio, Jr. Atanasio testified that he is the dispatcher and immediate supervisor of Medina. He gives the drivers the invoices in the order in which they are supposed to deliver. He doesn't give them any private accounts in the morning. They send the drivers to private accounts on second runs because private customers are not at home during the day. Atanasio was shown the invoices for Medina's run on November 6, 1986. He found these in the files. He found no other invoices for Medina that day. When Medina finished his run, he was to take a one hour lunch hour, then report back to him. He did not give Medina any private orders that day, November 6, 1986. He was asked, "Did you give him a delivery to an Italian restaurant on Rockaway Boulevard, near Flatlands Avenue?" (Medina had stated that he made such a stop.) Atanasio answered, "No, these invoices are the complete run for the day." In Atanasio's opinion the total time for delivery and everything on Medina's run would be about two hours. He had been a driver and knew all those stops. The total mileage up to the last stop was from 12 to 15 miles – maximum. He then testified in detail as to how long each stop would take. The maximum time for driving time and delivery time would be about three hours. If Medina came back in

about three hours, he would have been given a secon [sic] run. Atanasio was asked, "Medina testified that on November 6, he waited until 10:15 before he left. Is that accurate?" He answered, "No, it is not." He evaluated Medina's performance as "In one word – poor. He disregarded instructions. At times he didn't make deliveries in the order he was supposed to make them." There were complaints from customers that Medina was rude, but he couldn't recall the specifics. Sometime in 1986, the Old Garden Restaurant in Manhattan called and told him that Medina was rude – that he threw merchandise on his kitchen floor and he did not want Medina in his establishment. He believes that Medina was transferred to a different route. There was the same problem with the 1407 Club – sometime in 1986. Basically, it was said that Medina was arrogant and insulting. The Company then transferred Medina from the West Side to another run. Medina has had a beeper from about one or two years before his discharge. Medina never answered his beeper and Atanasio spoke to him 15 to 20 times about not answering his beeper. To track Medina down, they had to call his stops and leave a message for him to call Atanasio. He added, "My experience was that he still did not call in to the office." In 1986, from 25 to 30 times, he didn't call back after he (Atanasio) left messages with customers. He spoke to Medina about his failure to call after these messages about 25 to 30 times. On numerous occasions in 1986, when Medina failed to answer his beeper, Atanasio spoke to him when he arrived back at the shop, tested his beeper and in every case the beeper worked.

On November 6, 1986, he expected Medina back from noon to 1:00 p.m. and to go out on a second run. When he was not back at 1:00 p.m., he dialed Medina's beeper number and every 10 to 15 minutes for two to three hours, he beeped Medina. There was no answer from him. About 4:30 to 5:00 p.m. an employee said he had seen a Company truck parked on Pitkin Avenue about half a mile from the shop. This employee gave him the number of the truck and Atanasio found the truck was assigned to Medina. He then informed Jack Slavin that Medina was way past overdue. Medina showed up about 7:00 p.m. and Atanasio was not involved (with Medina) after that.

On cross examination, Atanasio described how loaders load the trucks in the morning. Wednesday, Thursday and Friday are the busier days. There are more stops on Friday. Generally, Manhattan runs are sent out first and Brooklyn and Queens last. When he spoke to Medina about the complaint from Horn & Hardart about urinating, Medina denied it. This was about six months ago (as of February 6, 1987). He could not recall how long ago there was a complaint from the Old Garden Cafe. On November 6, 1986, he recalled that he told Medina in which order to do that run and handed him the invoices in the order to do that run. There was a new invoice which was instituted about the week of November 3 or 4, 1986. The forms (showing Medina's run on November 6, 1986) are on the old form. The system works the same way, however. Private customers have yellow bills – four copies. They do not deliver to private customers' homes before 3:00 p.m. Two or three trucks are dispatched to Brooklyn on the average, in the morning.

Atanasio testified, "I'm absolutely sure none of the invoices are missing from Medina's run on November 6, 1986." He did not have the log sheet for Medina for November 6, 1986. The form (of log sheet) was changed and one dated in February, 1987 is different from ones used in 1986. He couldn't recall when the change was made. After one month, the Company throws out the log forms. All November, 1986 log forms have been discarded. The old form did not have "mileage" on it nor a space for the condition of the truck. It did have the date, sequence of stops, time of arrival and departure of each stop. There are no other records to show what work Medina did on November 6, 1986 in the absence of the log. Not all drivers are expected to make two runs in one day. The employee who saw Medina's truck on Pitkin Avenue is Manny Alexander who is a non-union employee who runs errands in his own van. He told him it was about six blocks from the shop. Atanasio told Jack Slavin about the truck at about 5:00 to 5:30 p.m. He did not recall if Barry Slavin asked him, in Medina's presence, on November 7, about Medina's run the day before. He did not recall saying that Medina didn't leave until 10:15.

At the next arbitration hearing on March 10, 1987, a court reporter appeared and a transcript of the hearings on March 10 and 20, 1987 was made.

Ignacio Atanasio, Jr. continued in his cross examination. He was asked again, "And to the best of your recollection, that is a full and complete list of the assignments he had that day?" (referring to the six invoices). Atanasio replied, "Yes." He also replied that Medina had no home delivery that day and that Medina had no

C.O.D. deliveries that day. Atanasio stated that, "On this particular run in question, I looked over the bills and there was no problem with any – with delivery with any of the customers. They would take delivery at any time, even during lunch hour." He looked over these bills on November 6, 1986 and also in preparation for the arbitration hearing. He was asked how long did he continue to try to raise Medina on his beeper after 12:00 or 1:00 o'clock. He replied, "Well, for about – for about an hour the first time and then continued about an hour or an hour and a half later." Mr. Alexander is still with the Company. In November, 1986 when drivers returned, they turned in bills, signed receipts and gave cash to Howie Alpern. The drivers' record of stops (log) is disposed of after a month, but a record of cash receipts is kept for about six months. This record would show the customer and the amount of money, but not the driver. If Medina had turned in any C.O.D. money that day, Atanasio would have a copy of the bill attached to the exhibit (the six invoices). Atanasio was asked "– you would be the sole source of direct information in terms of when he (Medina) left, when he was due back, what you had done to pursue him, et cetera?" He replied, "Yes."

On redirect examination, Atanasio stated that he first knew that Medina had stopped work early on November 6th when Manny Alexander told him he saw the truck parked on Pitkin Avenue between 4:30 and 5:00 p.m.

Mitchell Slavin testified that he had a number of occasions to speak to Medina when he would have the time missing in his log or the stop missing or just refused to fill them out in their entirety. The work rules were given out to all employees on September 23, 1986 on pay

day. One of Mitchell Slavin's functions in 1986 was to watch the time logs. He did not recall having anything to do with George Medina on November 6th. He then testified about driver's log form and how it is to be filled in. He did not recall examining the drivers' logs on November 7, 1986 for the previous day. He did not remember when he became aware of the fact that there was a problem with respect to Medina's work on November 6th. Within a week of the time Medina was terminated, he pulled Medina's log when someone – he thinks it was Mel (Tortorici) asked him to. He (Mitchell Slavin) recalled examining Medina's log at that time and he delivered it to Mr. Tortorici. When he (Mitchell Slavin) testified on direct examination that the work rules were distributed on 9/23/86, he really meant 1985.

Mel Tortorici testified that he is a general manager, dealing with personnel matters. He described in detail the problems the Company had with Medina and his disciplinary record, including the truck parking incident resulting in the Final Warning Notice dated 7/14/86 (quoted above). Tortorici had disciplined Medina because of absenteeism when he did not call in that he was going to be absent. Tortorici, however, did not handle or maintain the records of absenteeism. He did not recall that Medina had told him that he had called in and notified a woman in the office. Tortorici had no contact with Mr. Medina on November 6th. On November 7th, Barry Slavin explained to him that George Medina went out and he had six stops and he got back "at a quarter to seven, 6:30, you know, I'm not sure exactly of the time, and there was no way, based upon his stops, that it could have taken him that long. Plus his truck was spotted on

Pitkin Avenue for a lengthy period of time, stagnating." Junior had mentioned this to him on the 6th – anywhere between 3:30 and 5:00, he didn't remember exactly. Tortorici made no effort to go to Pitkin Avenue because he didn't want to leave his place with no replacement or without closing it up.

Tortorici stated that he was the one who wrote the formal termination letter, but was not clear when. He believed it was maybe a week, maybe three days (after November 7, 1986). The information for the letter was given to him by Junior, Mr. Slavin and Manny Alexander. He was given Medina's driver's log for the 6th on the morning of the 7th. Barry Slavin told him he was firing Medina for goofing off and taking too much time on his stops, as far as he could remember. Tortorici examined Medina's log and then gave it back to Mitchell. As he recalled it, the log indicated six stops. He did not have any idea where the log is (as of March 10, 1987). He did not recall any reference in the log for a delivery to "Heroes Plus", nor any reference in the log for a delivery to "El Patrice". When he wrote that Medina was fired for theft of services, he meant that he was being paid for services not performed – that was the goofing off part of it. The part which he wrote about not following company work rules and regulations was for not answering the beeper. As for not filling out his log, to the best of his recollection, Medina had filled out his log correctly on the 6th, but maybe not on the 5th. The log for the 5th was not available (on March 10, 1987). The July 1 letter was drafted by Mr. FAICCO and himself. He had Mr. Medina sign this letter. Even after a meeting with the Union, the same problems would occur with Medina.

Barry Slavin testified that he signed a letter, dated July 12, 1985 and addressed to the Union. In sum, it notified the Union that Medina was on probation for inability to follow instructions about keeping his log. He had terminated Medina once or twice but couldn't remember when. Medina was reinstated after the first termination. It was a long way back. He personally had said to Medina, "Why didn't you fill out your logs?" and he would get answers like "I'm too busy." It was hard to talk to Medina because if you talk to him for a second, the next thing is that he is 25 feet away or shadow boxing or jumping. Barry Slavin then testified in detail about the problems with Medina which resulted in several changes of Medina's route. Finally, Medina was given the Brooklyn run, which is the easiest route. About 2:00 o'clock (on November 7, 1986), he pulled out Medina's route and looked through all the tickets. He figured out that Medina had taken advantage of the route and told Tortorici to tell Medina that he didn't want Medina to work there any more.

On cross examination, Barry Slavin stated that he is the overall manager. He had no recollection as to whether he had any knowledge of Medina's activities on November 6th. It was on the morning of the 7th that he determined to discharge Medina. He had spoken to his brother Jack about 9:00 to 9:15 on the evening of the 6th. His brother told him what he had heard from Junior and Mr. Medina. To the best of his knowledge, the exhibit (six delivery slips) constituted all assignments to Mr. Medina for the 6th. He did also look at the driver's log before he terminated Medina. Based on what he had seen in the log, based upon what he had seen in the route, based upon

prior experience with problems, he made a business determination to fire Medina. The Company does have a customer "Heroes Plus" but it's not a regular customer. The Company has had a customer "El Patrice" maybe one or two times but El Patrice came after Medina's termination. When his checks bounced twice, the Company stopped selling him. "Heroes Plus" (two locations) was a C.O.D. customer. For the couple of times the Company sold to "El Patrice", he was a cash (C.O.D.) customer. "El Patrice" was not a customer prior to Medina's termination. Cash tickets have different colors, but they would have been batched with these (the six slips in the exhibit).

George Medina, called as a witness by the Union, testified that he recalled getting a warning notice about absenteeism, but he had called in the night before he was absent and spoke to a blonde lady, whose name he didn't know. He told Mr. Tortorici that he had called in, "But they said nobody told them anything and that they didn't have any choice but to give me one of those letters." On the no more than five times in a year that he was absent, he always called in. He had been suspended for about three days and remembered having a meeting with the Union and Mr. Tortorici about the end of June or July 1 of 1986. Sometimes if he was in the middle of a traffic jam or in the middle of a bridge, he couldn't call right away (to answer the beeper call). Medina repeated his testimony that sometimes the log (time sheet) forms were not available to be filled out. He didn't remember if anyone told him he had to fill out the log the right way, but maybe they did. After he signed the letter, he did everything right because he knew the job was on the line. He answered the beeper and filled out the time sheet because

he knew they were serious and he would be out of a job. In regard to the parking incident, Medina said there were other trucks parked there and he left a space. He added, "And as I understood, the guy that was in front, they had sent him out, and when he took out his truck, that left my truck by itself, you know." On November 6, 1986, he went out on his run at 10:15. He had 12 to 14 stops. He had C.O.D.s and private stops and stops he had to make after a certain time. He had to hustle and didn't take lunch that day. After he made his last stop, he went into the beauty parlor to see his wife. He told her he was going back to the store, that he had a couple of returns and had to clean his truck and she should pick him up in 25 to 30 minutes. He was at the beauty parlor no more than four or five minutes. He went right back to the store. The next day, Barry Slavin told him he was fired.

After the arbitration hearing on February 6, 1987, Medina knew he had more than six stops, so he tried to remember and he did remember some stops. He went to "El Patrice" and received a slip on the Company's order form. The date entered looks like 11/6/86 which might have been 11/5/86. Counsel for the Company objected strenuously because of falsified information. I accepted the document into evidence with the condition that the Company would have an opportunity to check on its accuracy and authenticity. Medina stated that he wrote "Md." on this ticket and this was his last stop. It was a C.O.D. and he collected $61.45 which he turned in on November 6th. The boss at "El Patrice" first did not want the filet nor the squid, but then changed his mind and took the squid. He returned the filet to the Company. At the top of the slip, it says, "Stop after 2:30." This meant

that Medina had to go there after 2:30. Junior had written this. Medina in addition to going to "El Patrice" went to "Heroes" also. An order slip dated 11/6/86, on a Company printed form for an order of flounder filet sold to "Heroes Plus" was admitted into evidence on the same condition that the "El Patrice" order slip was admitted.

Medina added that there were a lot more stops which he could not remember. There were six or seven or eight stops missing, including about five private stops. Even though the delivery to "Heroes Plus" was on a charge form, they paid him $32.60 because they pay less in cash than if they sign (charge) for it.

At the final hearing on March 20, 1987, Medina was cross examined. He testified that he had no less than 12 stops on November 6, 1986. He had seen the six charge slips introduced as an exhibit, but he also had a C.O.D. and some private stops. He picked up (cash) on the C.O.D. from Patrice. The private (house) stops were around the area of 22 Cropsey Avenue, but he didn't remember the stops. I then asked Medina, "– Is 22 Cropsey Avenue a private stop or not?" He answered, "No, it is not." Company counsel then asked, "but it is near 22. So it could be 5000 Cropsey Avenue?" Medina replied, "No. Private stop was around 50th Street. It could have been in the 50's, the 60's." The next question was, "What does Cropsey Avenue have to do with it?" He replied, "You asked me where it was." The next question was, "Is Cropsey Avenue on 50th Street?" He replied, "No. Cropsey Avenue is about 25, 20 minutes away from where I used to make private stops sometimes." Medina again stated that Cropsey Avenue has nothing to do with it. He did not remember if any of the private stops paid

him. All the private stops were in Borough Park. He gave about three cash receipts to Howie (at the Company). All were C.O.D.'s, but he didn't remember whether or not he collected money. He gave about three cash receipts to Howie. He didn't go around to collect any other slips (in addition to "El Patrice" and "Heroes Plus") because he couldn't remember any of the other stops.

The Employer introduced as one exhibit a driver's time sheet, dated 6/25/86, with sixteen customers listed and under arrival time, there is but one entry of 2:00.

When Tortorici gave him the termination notice to sign, Medina refused to sign it and said he was going to call the Union. He never filed a grievance regarding the July 1, 1986 letter. He did sign this letter, but didn't remember signing it. He signed a warning slip of July 14 about parking in the driveway of the parking lot, but he wasn't in the driveway. He signed it because he didn't want any problems. He did remember receiving the Company's rules and regulations but he did not remember signing that he had received them.

Counsel for the Company asked many questions concerning route changes. I see no need to recite these facts, in view of what I shall state in the *DISCUSSION* section of this Opinion. Much of this is repetition of testimony obtained on February 6, 1987.

In response to my questions, Medina stated that Barry Slavin told him 20 to 25 times, "Don't bother with the log today. Just go out and do your run." Later, in the course of my questioning, Medina conceded that whenever the Company had the log form, he was supposed to fill them out – except for the 20 to 25 times when he was

told not to bother with the log. He didn't remember how many times after July, 1986 that he didn't get any forms to fill out. After the warning about the logs, every time he was given the log form, he filled it out completely. Medina thinks that he did fill out a log on November 6th.

Mel Tortorici was recalled as a witness by Company counsel. He testified in detail about the parking incident, where Medina's truck was blocking the entrance to the yard. He was asked again and gave the details about the not calling in absenteeism problem and warning. He remembered that Medina did *not* tell him that he had called in. Tortorici then gave details of the meeting of July 1, 1986 with Mr. Faicco of the Union. This was after the suspension of Medina. They talked about the discourteous attitude Medina had toward customers, "the fact that he never filled out a log and how important a log was to us, and the importance of answering his beeper."

He stated how Barry Slavin instructed him to discharge Medina on November 7. Tortorici testified that Barry Slavin said, "I just can't take it. I am fed up with him. I can't talk to him. He doesn't stand still for a minute for me to talk to him. You take care of it. He had a run yesterday. He got back extremely late. There is absolutely no reason for it. It is in your hands." According to Tortorici, when he spoke to Medina on the 7th, Tortorici said he would go upstairs and check out all Medina's runs and see what he did. Then Medina said to him, "Well, I didn't fill out my log yesterday. Tortorici asked him why. He said, "I didn't have time. I was in a rush. I was moving around. I was trying to make time." After that, Tortorici filled out a termination notice.

After the arbitration hearing held on March 10, 1987, Tortorici pulled out every bill for every cash or C.O.D. customer for that day. They were filed in alphabetical order by customer. He matched them with the sheet for all cash customers for November 6. He verified that Medina did service the two customers "Le Patrice" and "Heroes Plus" and he found a third one "La Gioconda". So Medina had nine runs that day. There was a vague area at this point in the arbitration concerning how long the suspension was in May, after someone from Marriott had complained about Medina's attitude. I stated that it would make no difference to me whether the suspension lasted two, three or five days and it was not necessary to look for payroll records to establish the length of the suspension. The Union introduced as an exhibit a letter, dated May 28, 1986, informing the Union that Medina was placed on suspension and the situation was being evaluated. The Union never filed a grievance over this suspension.

The Company called as its final witness, Gaspare Boncimino. Boncimino was employed by the Company from 1979 until 1981 when he left. He returned to work for the Company as a truck driver about three months before (March 20, 1987). Boncimino made a run on March 18, 1987 and filled out a log showing arrival and departure times at nine listed customers. These customers are the same nine customers which Medina had on November 6, 1986. It shows that he arrived at his first stop at 10:30 and departed from the last stop at 2:52. At the bottom in the block labeled "Time in" is written 3:10. It also shows "Lounge" 1:50 to 2:40. The witness explained that this is the time he had lunch.

Boncimino conceded that he didn't fill in the space entitled "Mileage Out" nor things about oil, heater, fuel gauges. He said he didn't because anything he checks, he speaks to the mechanic. He can't write good English and he spoke to the mechanic when he got back with his truck. He didn't fill in the space for "Mileage In". Nobody ever complained or suspended him for not filling all those things in. He didn't fill in the column entitled "Hrs./Mins".

The post hearing briefs were received by me on May 18, 1987. My uncle died in Massachusetts on May 26, 1987. I requested an extension of time within which to issue the Award to June 25, 1987. The Tribunal Administrator of the American Arbitration advised me that representatives of the Parties agreed to said extension.

DISCUSSION

In over 12 years as a full time arbitrator, I have issued decisions in well over 100 discharge cases. This is one of the most bizarre that I have encountered. First, I accept the fact that Medina had a poor work history. In July, 1986, he conceded that he had been thoroughly warned and the next discipline would warrant his discharge.

The next step which caused the discharge was what happened on November 6, 1986. There is a credibility issue as to how much time Medina took and whether he "goofed off" and forced the Company to pay him for time when he was not working.

I agree with the Company's assessment that Medina was a most evasive witness and in many areas his testimony was not credible.

The Company witnesses, especially Atanasio, repeated many times that he was absolutely sure that Medina was only assigned to six stops that day.

After Medina remembered two of the stops in addition to the six upon which his discharge was base, he secured evidence that he made these two stops. The Company then made a search and discovery that Medina had, in fact, made these two stops and discovered that he had made still another stop, making a total of nine stops that day. It is difficult for me to understand why the Company didn't know this before discharging Medina. It may have been an attempt to make the case more solid against Medina than it was – or it may have been due to inadvertence. I subscribe no ulterior motives to the Company – yet in the same vein, I fail to understand why Medina's log for November 6, 1986 was not presented at the arbitration. The testimony was that the logs are discarded after about a month. Medina's log was pulled, however, and the Company had knowledge that this dispute was going to arbitration within a month. I draw no inference from the absence of the log, but it does make me speculate as to why the Company did not preserve and present evidence which is of such importance.

Further, there is more reason for me to credit Medina's assertion that he had at least 12 stops that day than to credit the Company's final statement that he had only nine stops that day.

An employer has the burden of proof to convince an arbitrator that there was just cause to discharge an employee. Regardless of the label for the quantum of proof necessary, the Arbitrator must be persuaded that the Employer has met this burden. I use the term "clear and convincing evidence" to quantify the proof necessary to persuade me.

In this matter, I conclude that the Company has not met this burden. The discharge was based on false information – that is that he took a long time to make six stops. Because of the initiative of the Grievant, he was able to prove that he made two additional stops and the Company, in its search, verified that he made three additional stops. Whether Medina made 12 stops or more, as he claimed, is speculative. As I have stated at the outset, I found him to be an evasive witness and he may be prone to self-serving exaggeration.

The Company, on the other hand, had its case irrevocably flawed when it was proved that the main reason to discharge Medina was based on wrong facts. In the context of the testimony, I can't credit Atanasio's testimony that he called Medina on the beeper a number of times. The only evidence that Medina had "goofed off" was that his truck was parked on Pitkin Avenue. This evidence was obtained by *Medina's testimony.* Alexander was not called as a witness, thus Medina's testimony that he was there for four or five minutes stands uncontradicted. I find this amount of time to be *de minimis* and insufficient to warrant a discharge.

When this Company, or any other employer, wants to discharge an employee, it must have just cause – which means that the *true facts* must justify the discharge.

AWARD

The Company did not have just cause to discharge George Medina.

The Company is directed to offer George Medina reinstatement to his former position.

The Company is directed to make George Medina whole for loss of pay and other benefits from the date of his discharge to the date of the offered reinstatement.

Dated: June 23, 1987
Scarborough, New York

/s/ Bertram T. Kupsinel
BERTRAM T. KUPSINEL,
ARBITRATOR

APPENDIX G

M. Slavin & Sons, Ltd. – Collective Bargaining Agreement – (Brooklyn Agreement) – Article XIV *Grievance Procedure And Arbitration* (Section 14.6)

"14.6 The power and authority of the arbitrator shall be strictly limited to determining the meaning and interpretation of the explicit terms of this Agreement as herein expressly set forth. The arbitrator shall not have authority to add to or subtract from or modify any of said terms, or to limit or impair any Common Law or other right of the Company or the Union, or to establish or change any wage or rate of pay. The arbitrator's award shall be in accordance with the laws of the United States, of the State of New York and local laws and shall be final and binding on matters properly before him. The decision of the arbitrator shall be based solely on the evidence and arguments presented to him by the parties in the presence of each other. The parties agree that the power and jurisdiction of any arbitrator chosen hereunder shall be limited to deciding whether there has been a violation of a provision of this Agreement. The arbitrator shall render his award within thirty (30) days after the close of the hearing or submission of the parties' briefs, whichever is later."